DERIENZO AND WILLIAMS, P.L.L.C.
State Bar #00510200
3681 N. ROBERT ROAD
PRESCOTT VALLEY, AZ 86314
TEL.: (928) 759-5572
FAX: (928) 759-5573
Email: yavapailaw@hotmail.com
Craig Williams
Attorney at Law



**IN THE SUPERIOR COURT OF THE STATE OF ARIZONA**
**IN AND FOR THE COUNTY OF YAVAPAI**

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| STATE OF ARIZONA,<br><br>Plaintiff,<br><br>vs.<br><br>STEVEN DEMOCKER,<br><br>Defendant. | **V1300CR201001325**<br><br>**RESPONSE TO STATE'S MOTION FOR CLARIFICATION OF RULING RE: NOTICE**<br><br>**(Hon. David Mackey, Presiding Judge, Hon. Warren Darrow)** |

The Defendant, by and through undersigned counsel, hereby complies with the Court's January 20, 2011 "Ruling Re: Motion," and Responds to the "State's Motion for Clarification of Ruling Re: Notice" (hereinafter: "Motion for Clarification"). For the following reasons, the state's Motion for Clarification should be denied and the case re-assigned to Judge Darrow for a hearing on the state's 10.2 Notice.

The state's latest pleading presented another needless legal dilemma in a case already over-flowing with needless and delay-causing dilemmas. That said, from a simplistic point of view – without any analysis whatsoever of the state's actions up to this point – the state would *probably* be correct when it stated:

> "Rule 10.6 is unambiguous and supports the State's position that Defendant's Objection to Notice of Change of Judge cannot be heard by Judge Darrow."

(Motion for Clarification, pg. 2).

However, the state could only be considered "correct" ***if*** its 10.2 against Judge Darrow could be considered valid. Which it is not.

In its Response to the Defendant's Objection to Notice of Change of Judge, the state made the argument that the Defense had been "false and misleading" in its Objection to Notice of Change of Judge (which correctly noted that substantive issues had been heard by Judge Darrow):

> "At the time the [December 10, 2010] Indictment was handed down by the grand jury, and on the day the State filed its Notice of Judge, there were *no substantive issues pending* before this court."

However, as pointed out in the Objection to Notice of Change of Judge, the timing of the state's actions building up to its 10.2 Notice against Judge Darrow completely undermined the credibility of the state's position. A few of the substantive issues which remained open at the time of the filing of the 10.2 Notice were:

1) Dismissal with or without prejudice? This issue was left open by stipulation of the parties, and acknowledgment of the Court *before* the Defense moved for a mistrial of the original murder case (P1300CR20081339). Any motion regarding this subject should be decided by Judge Darrow.
2) "Intervener" parties had moved to un-seal the sealed records in the case(s), which the state did not oppose[1].
3) Any use of the "E-mail case" and Life Insurance evidence in the "murder case" (per Rule 404(b) and Rule 13.3).
4) Any stipulation(s) that the pre-existing motions and decisions carried over from the old Indictment(s) to the latest Indictment.[2]

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[1]See: state's "Response to Western News & Info, Inc.'s Application for leave and Motion to Unseal Court Records and Proceedings." The Response stated: "... the State agrees with WNI's statement of law regarding

[2]See: MEO, 12-13-2011, pg.3, which notes the Defense stipulation *after* the not guilty plea in the latest Indictment. A transcript has been ordered of that hearing.

The state's proposed application of Arizona law would encourage forum shopping and thus undermine Rule 10.2. Abuses of Rule 10.2 significantly frustrates its purpose. The state cannot use the grand jury to wipe out the law of the case and to "win" a new 10.2 notice. Where would that ever end? Every time the state received a ruling they didn't like, they would simply head back to the grand jury. This could go on and on, ad nauseam. After all, the process of securing that new Indictment was not as the state implied in its pleading: that the grand jury "handed down" the new Indictment. No, the state – alone – *sought* that Indictment. The 280 page Grand Jury Transcript absolutely demonstrates the state's intent seeking a clean slate under its tortured reading of Godoy v. Hantman, 205 Ariz. 104, 67 P.3d 700 (Ariz.,2003). No Law of the Case, no repeat of the rulings that went against them, no messy Rule 13.3 / Rule 404(b) hearings, no speedy trial violation, no sealed records, etc.

If it does not go well for the state this time? Back to the grand jury, then. And, after getting a yet another new Indictment, they can get rid of another judge.

However, the state's latest move – that Judge Darrow cannot rule on the 10.2 objection -- sounds like a horizontal appeal.

> A party seeks a "horizontal appeal" when it requests a second trial judge to reconsider the decision of the first trial judge in the same matter, even though no new circumstances have arisen in the interim and no other reason justifies reconsideration. Hibbs v. Calcot, Ltd., 166 Ariz. 210, 214, 801 P.2d 445, 449 (App.1990). We criticize horizontal appeals because they waste judicial resources by asking two judges to consider identical motions and because they encourage "judge shopping." Id.; see Chanay v. Chittenden, 115 Ariz. 32, 34, 563 P.2d 287, 289 (1977); Mozes v. Daru, 4 Ariz.App. 385, 389, 420 P.2d 957, 961 (1967).

Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II, 176 Ariz. 275, 278-279, 860 P.2d 1328, 1331 - 1332 (Ariz.App. Div. 1,1993).

The basis for all charges in the new Indictment have been known by the state for a long time, and thus no credible argument could be made that there are "new circumstances." The state had previously indicted the "E-mail" case in V1300CR201080461. In the latest Indictment, the charges in V1300CR201080461 were merely melded in with the "murder case" and the fraud scheme charges involving Hartford Life Insurance policies. In its "Response to Defendant's Objection to Notice of Change of Judge," the state wrote:

> "The fraud scheme charges involving the Hartford Life Insurance policies on the victim Carol Kennedy's life began *prior to the homicide* and continued past the arrest and incarceration of the Defendant"
>
> Arizona case law addresses situations in which there are no "new circumstances."
>
> We first comment with disfavor on the practice followed in the trial court in this case. *Arizona courts have stated on numerous occasions that one trial judge should not reconsider the decision of another in the absence of new circumstances*. See, e.g., Chanay v. Chittenden, 115 Ariz. 32, 34, 563 P.2d 287, 289 (1977); Union Rock & Materials Corp. v. Scottsdale Conference Center, 139 Ariz. 268, 272, 678 P.2d 453, 457 (App.1983). The Belt affidavit was additional evidence in support of the theory rejected by Judge Cates. It was not, however, newly discovered or previously unavailable evidence, and did not justify reexamination by a second judge. We appreciate that the superior court in Maricopa County engages in departmental reassignments and calendar transfers from time to time. However, motions for new trial or reconsideration are ordinarily routed to the original judge where, as here, the original judge has merely been transferred to a new assignment on the same court. That practice should have been followed in this case. *The contrary practice is wasteful of judicial resources and encourages "try again" motion practice when a new judge gets a case.*

(Hibbs v. Calcot, Ltd. 166 Ariz. 210, 214, 801 P.2d 445, 449 (Ariz.App.,1990), Italics added).

The law of the case is an important factor. Judge Darrow issued numerous rulings during the case, and did not disturb much of what Judge Lindberg before him had done.

The state had filed a 10.1 motion against Judge Lindberg, on December 3, 2010, just a

week before going to the grand jury for the latest Indictment. That 10.1 motion was needless, since Judge Darrow was handling the case.

The December 10, 2010 trip back to the grand jury was to get an all-in-one Indictment, a fresh time clock for Rule 10.2 purposes, and for carte blanche on future motions, evidentiary rulings (without motions for re-considerations), and to *obliterate the law of the case*.

Rule 16.1(d), Arizona Rules of Criminal Procedure, addresses how many trips to the well a party gets on pre-trial rulings:

> Finality of Pretrial Determinations. Except for good cause, or as otherwise provided by these rules, *an issue previously determined by the court shall not be reconsidered.*

(Id.)

There is no valid reason to re-visit previously decided motions and the law of the case.

Finally, it would not be too cynical to suggest that the state's actions leading up to the 10.2 Notice against Judge Darrow, was really a 10.1 notice in disguise. The state has created this legal conundrum by seeking a re-indictment, and a 10.2 notice against Judge Darrow, directly on the heels of its failed 10.1 notice against Judge Lindberg.

**Conclusion**

This abuse of Rule 10.2 significantly frustrates its purpose. For the above stated reasons, the "State's Motion for Clarification of Ruling Re: Notice should be denied and the case remanded to Judge Darrow for a hearing on the 10.2 Notice.

RESPECTFULLY SUBMITTED on January 28, 2011.

Craig Williams
Attorney for Defendant

Copies of the **hand delivered** on this date to:
Joe Butner, Jeff Paupore, Yavapai County Attorney's Office (per Court Order).

Original delivered via the Clerk's Office to:
Hon David Mackey, Presiding Judge of the Superior Court, Hon. Warren Darrow, Judge of the Superior Court.

Delivered to:
Greg Parzych, via e-mail.
The Defendant, via mail.

By